IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 156 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHANCHAL D/O CHHGANBHAI AMARBHAI & W/O RATNABHAI KOLCHA

Versus

HEIRS OF TETIYABHAI C KOLCHA

Appearance:

MS PATEL FOR MR AJ PATEL for Petitioner

MR AH SHAH FOR MR GIRISH D BHATT for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 24/11/2000

ORAL JUDGEMENT

1. This Second Appeal u/s 100 of the Code of Civil Procedure arises out of a judgement and decree rendered by the learned Joint District Judge, Vadodara in Civil

Appeal No. 254/81. The said Civil Appeal arose out of a judgement and decree rendered in Regular Civil Suit No. 154/76 by the learned Civil Judge [J.D.] - Chhota Udaipur on June 30, 1981.

2. The facts of the case are that the appellant had preferred the said suit against Tetiyabhai Chimarabhai Kolcha, whose legal representatives are the present respondents. For the sake of convenience, the appellant would be referred to as `the plaintiff' and the Respondent who represent the original defendant would be referred to as `the defendant' in this judgement.

2.1 The plaintiff had basically preferred the suit against the defendant for partition of the ancestral property with an alternative prayer for declaration of her title over some of the property and possession thereof. In order to appreciate the cases of the parties, it would be necessary to know the family tree. The parties pedigree starts from one Chimarabhai. Chimarabhai had two sons, Chhaganbhai and Tetiyabhai. Chhaganbhai was married to Bai Bhati, and had one son Magan and one daughter Chanchi. On demise of Chimara, the properties were partitioned between Chhaganbhai and Tetiyabhai. Chhaganbhai expired on 1/3/1957, leaving behind him Bai Bhatti [widow], Maganbhai [son] and Chanchi [daughter]. Bai Bhatti has remarried on demise of Chhaganbhai. Maganbhai expired on 1/9/1973, leaving behind his sister Chanchi. Chanchi was looked after by Tetiyabhai [her uncle]. Chanchi was then married to one Ratnabhai Girdharbhai. The result is that, in the branch of Chhaganbhai, the only surviving heir is Bai Chanchi. This was the situation around the time when the suit was filed. It appears that, pending this litigation, Tetiyabhai has also expired and his heirs have been brought on record as respondents.

3. The plaintiff has come with a case that she, as the only surviving heir of Chhaganbhai Chimarabhai, is entitled to the property of Chhaganbhai Chimarabhai, which came to his share from the ancestral properties of Chimarabhai. When the plaintiff demanded her right, the defendant paid no heed. She therefore inquired that the revenue department is around 10/10/1973 to find out that the defendant had got all the properties transferred to his name in the revenue records with the ulterior motive of damaging the interest of the plaintiff in the properties. The suit was therefore filed by the plaintiff, for declaration that the plaintiff has a share in the suit properties and to get her share decided in the lands and the building. The suit was also for

recovery of Rs.3,000/- as mesne profit for preceding three years.

4. The properties in which share is sought can be stated as under :-

Survey No.	Acre - Guntha	Description
1. 31	3 - 22	) Located in the
2. 61/1	2 - 20	) sim [outskirt] of
3. 61/2	2 - 19	) Village Thalki,Pavi]
4. 69/2	1 - 14	) Jetpur [Pavi]
5. 93	1 - 04	) Dist. Baroda
6. 102	1 - 02	)
7. 113	2 - 23	)
8. 197	1 - 26	)
9. 229	2 - 00	)
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18 - 16		
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5. The alternative contention raised in the plaint is that the properties were initially mutated to the name of the father of the plaintiff and thereafter, the name of the brother of the plaintiff and were in his possession. Upon demise of Maganbhai, though the plaintiff was the sole heir / legal representative, the defendant got these properties transferred to his name. The plaintiff therefore claims to have filed the suit for declaration that the plaintiff is the owner of the said properties and for a direction of paying Rs.1,000/- per annum for a period of three years upon the defendant by way of mesne profit. The alternative relief sought is in respect of the following properties :-

1. Survey No. 61/1 admeasuring 2 acres 20 gunthas.

2. Survey No.93 admeasuring 1 acre 04 gunthas.

3. Survey No.114 admeasuring 2 acre 23 gunthas.

4. Survey No.69/2 admeasuring 1 acre 1 gunthas.

5. Survey No.31 part admeasuring 1 acre 36 gunthas.

7. The defendant filed his written statement at exh.12. In the written statement, the defendant has denied one and all contentions raised by the plaintiff in the plaint. Besides this, it is contended that the suit is beyond limitation and is therefore time barred. It is also contended that the plaintiff had earlier preferred Civil Suit No.35/75 for this very subject matter and the present suit is therefore not maintainable in light of provisions contained in order 2 rule 2 & 3 of the CPC. It is also contended that the plaintiff has no right to bring the suit, and that the doctrine of estoppel will operate against the plaint.

8. The trial court after considering the contentions raised by the parties, framed the following issues :

[1] Whether the plaintiff proves that she is the only heir of the deceased Chhaganbhai?

[2] What are the respective shares in the suit properties?

[3] Whether the plaintiff is entitled mesne profit. If yes, to what amount?

[4] Whether the suit is barred by limitation?

[5] Whether the plaintiff's suit is not maintainable in the present form?

[6] What is due to the plaintiff from the defendant?

[7] What should be the preliminary decree?

[8] What should be the final order and decree?

9. The trial Court came to the conclusion that the plaintiff could not prove that she is the only heir of deceased Chhaganbhai. The Court also concluded that the plaintiff failed to prove that she is entitled to claim mesne profits and that the suit is time barred. The trial Court came to the conclusion that the plaintiff is not entitled to any mesne profits. The trial Court concluded that the plaintiff is not entitled to any share in the properties, and ultimately, dismissed the suit.

10. Aggrieved by the judgement of the trial Court, the plaintiff approached the District Court with Civil Appeal, which was registered as Civil Appeal No. 254/81. The lower appellate Court, after considering the contentions raised before it, ultimately came to the conclusion that no error was committed by the trial Court in dismissing the suit, and upon not finding any ground for interference, the lower appellate Court also dismissed the appeal.

11. Again aggrieved by the said judgement and decree, the original plaintiff has preferred this Second Appeal u/s 100 of the Code of Civil Procedure.

12. Ms. Patel, learned advocate appearing for the appellant has taken this Court through the record & proceedings. She vehemently argued that although the scope for interference in second appeal u/s 100 of CPC is narrow, the Court may interfere in second appeal in cases where the finding of the Court is based on gross misreading of evidence or is based on a material which is absent or which is arrived at in neglect of material on record. She submitted that the case of the plaintiff has been drawn away and the plaintiff is non-suited only on the ground that the right claimed by the plaintiff under the provisions of the Hindu Succession Act, 1956 is not entertainable for the reason that the said Act does not apply to persons belonging to Schedule Tribe, and that the present parties belong to such schedule tribe. She submitted that there is no pleadings to this effect either by the plaintiff or by the defendant, nor is there any evidence to this effect, nor was there any such issue framed by the Court. The trial Court has founded its decision only on the basis of fact that the plaintiff has indicated her and the defendant's surname as Kolcha, and that Kolcha is a schedule tribe as per the notification. Ms. Patel submitted that this cannot be considered as an admission and the lower court gave no opportunity to the plaintiff to clarify her position or to offer any explanation in this regard. The doors of justice have been closed on face of the plaintiff without affording any opportunity to the plaintiff. She submitted that the error committed by the trial Court has again been committed by the first appellate Court. This has resulted into gross injustice to the plaintiff.

12.1 Ms. Patel submitted further that the courts below have overlooked the fact that the suit is not only arising out of succession, but the right is also ascertained on the basis of an earlier partition entered

into between the parties. The Courts below have ignored this aspect which has ultimately resulted into an injustice caused to the appellant. She submitted that if the opportunity was given to the plaintiff, the plaintiff could have explained her position and clarified as to whether the parties in fact belonged to schedule tribe or not. She submitted that the plaintiff has claimed that the properties are ancestral. The defendant has not seriously contested this assertion as can be seen from the observations made by the learned trial Judge. The death of the father of the plaintiff, so also her brother, has occurred after the date on which the Hindu Succession Act came into force. She therefore submitted that the parties would be governed by Hindu Succession Act. This aspect is not considered by the Courts below. She submitted that there is nothing to indicate that the parties belong to schedule tribe, and that they are not governed by Hindu Succession Act, 1956. Ms. Patel submitted that documentary evidence produced on record by the plaintiff to indicate partition of the properties has not been considered by the courts below. She submitted that relevant entries have been made in the revenue records and such entries assume greater evidentiary value in such cases and are held to be of great relevance by the apex Court. She submitted that the error committed by both the Courts below may therefore be quashed and set aside by allowing this second appeal.

13. Mr. A.H.Shah, learned advocate appearing for Mr. G.D.Bhjatt, learned counsel for the respondents has opposed this appeal. He submitted that the contention raised and vehemently argued upon on behalf of the appellant regarding the parties not belonging to schedule tribe and opportunity having been denied to explain the situation by the courts below, are raised for the first time in this second appeal. He submitted that this is a question of fact on which both the courts below have given a concurrent finding, and therefore, this Court may not interfere with the finding in this regard. He submitted that, as per settled proposition of law, persons belonging to schedule tribe are not governed by Hindu Succession Act. To this proposal, Ms. Patel concedes.

13.1 Mr. Shah submitted that if the contentions raised in the plaint and the reliefs sought therein are dispassionately considered, they appear to be quite contrary to each other. The suit is basically for partition and the alternative contention and relief is sought on a premise that a partition has taken place, and the same may be implemented. These two

self-contradictory contentions could not have been raised by the plaintiff.

13.2 It has been contended by Mr. Shah that no evidence was required to be led by the parties on the question whether they belong to schedule tribe or not. He submitted that the plaintiff, in the cause title, has indicated that both the parties belong to Kolcha community. That community has been included in the schedule of tribes. Mr. Shah submitted that, apart from this, the plaintiff has from the beginning come with a case that she is exempted from paying the court fees and consistently she has represented that she is exempted from paying the court fees. This exemption is granted by the Government of Gujarat under a notification to schedule tribe persons. When the plaintiff has taken benefit of exemption from paying the court fees stamp as a member of schedule tribe, she cannot now contend that she does not belong to schedule tribe.

13.3 Mr.Shah further contended that this contention was raised by the defendant's advocate at the time of arguments. But no attempt is made by the plaintiff to controvert or rebut the contention either in reply to the arguments of the defendant or in the first appeal. The argument is advanced for the first time in this second appeal when this ground is not even taken in the second appeal.

13.4 Mr.Shah contended that if the parties are not governed by Hindu Succession Act, they would naturally be governed by old uncodified Hindu Law, if it is shown that they are Hindus. He submitted that, in that eventuality also, the plaintiff being a lady would not be entitled to a share in the property of the coparcenary as per Uncodified Hindu Law, as applicable to Mitakshara.

13.5 Mr.Shah contended that much reliance is placed on the certified copies of the entries made in the revenue records. These entries, according to Mr.Shah, do not confer any title on the parties. He submitted that such entries are only meant for fiscal purpose. He does not dispute a proposition that any such suits, such entries would be relevant material to support a partition case, but cannot be a sole ground for deciding title of a party.

13.6 Last but not the least, Mr.Shah submitted that the scope for second appeal being very narrow, this Court may not interfere with concurrent findings of fact recorded by the courts below. He submitted that the

Courts below have not accepted the case of the plaintiff so far as partition part is concerned. Even the entries and the statement claimed to have been made by the defendants have not been accepted. This findings of fact may not be disturbed by this Court. He urged that the appeal may therefore be dismissed.

14. Upon considering the contentions raised by both the sides, it is evident that the plaintiff has approached the Court with clear case that the parties belong to Kolcha community. This is clear from the cause title of the suit, first appeal and second appeal. The Courts below have considered this as an admission and after considering the notification, have come to the conclusion that the parties belong to schedule tribes, and in light of section 2 sub-section [2] of the Hindu Succession Act, 1956, the provisions of the said Act are not applicable to the persons belonging to schedule tribe. The plaintiff therefore cannot claim any right in the ancestral properties. It may be noted that the contention was raised by the defendant for the first time during the course of arguments before the trial Court, but it appears from the elaborate judgement of the trial Court that this contention was not controverted by the plaintiff's side, nor was any opportunity sought for indicating that the parties do not belong to schedule tribe. It would also be worthwhile to note that even before the lower appellate court, this ground was not taken by the plaintiff in the memo of appeal, and this ground is not taken even in the second appeal. In the opinion of this court, therefore, in the given set of circumstances, the plaintiff cannot be permitted to agitate this ground in the second appeal as this is a mixed finding of fact and law.

15. It may be added that the plaintiff even while filing the suit and thereafter consistently has taken advantage of exemption granted by the Government of Gujarat to the members of schedule tribe in payment of court fees, and therefore, at this stage, the plaintiff cannot take a contrary plea or cannot be permitted to agitate the finding of both the Courts below.

16. Even otherwise, it transpires that the plaintiff's suit is basically that of a partition / succession. The plaintiff was therefore expected to specifically plead and prove by which law the parties are governed. The plaintiff has nowhere contended in the plaint and has led no evidence to indicate that the parties are Hindu, and that they are governed either by Hindu Succession Act or by the Uncodified Hindu Law.

Against this, the defendant has specifically contended in the written statement that the plaintiff has no right to bring the suit. In this view of the pleadings, it would be incumbent upon the plaintiff to have indicated as to how she is entitled to bring the suit and under what provisions of law she is asserting her right. The plaintiff having failed in doing so, the suit would fail even otherwise.

17. Ms. Patel, learned advocate for the plaintiff has cited several decisions in support of the case of the plaintiff.

17.1 She relied upon a decisions reported in (1) AIR 1993 KERALA 342 [M/s Balak Glass Emporium v/s M/s United India Assurance Co. Ltd. and others], (2) AIR 1993 KERALA 91 [Ibrahimkutty Koyakutty v/s Rahumankunju Ibrahimkutty and others], (3) 1993 [1] GLH 164 [Vatati Lalmohmed v/s Sarfunnissa Abdulmajid and others] and (4) AIR 1981 SC 1726 [Mangal Sen v/s Kanchhid Mal], to support her say that there must be specific pleading and in the instant case, there was no pleading regarding non-application of Hindu Succession Act to the parties as they belong to schedule tribe. There cannot be any dispute about the proposition laid laid down in the aforesaid judgements. But in the instant case, when the plaintiff herself has come with a specific case that the parties are Kolcha by community and when the Constitution [Schedule Tribes] Order, 1950 indicates that Kolcha is a schedule tribe, no specific pleadings is required for the purpose. Particularly in the second appeal, this court may not interfere for the reason that this contention is coming up for the first time before this Court, and that the argument advanced on behalf of the defendant before the trial Court has remained uncontroverted uptill now. These judgements in fact go against the appellant, as discussed above, when the appellant has not come with a specific case as to under what provision of law, the plaintiff asserts her right.

17.2 Ms. Patel has then relied upon the decision reported in AIR 1987 SC 2179 [Vinod Kumar Arora v/s Smt. Surjit Kaur] to indicate that even concurrent findings of fact can be interfered with in a revision u/s 115 of the CPC. She submitted that if in a revision interference is permissible, the Court may show indulgence in second appeal, as well. As discussed hereinabove, this Court does not find that the findings suffer from any inherent defects. As such, there is no variance between pleadings and proof and the decision therefore cannot help the plaintiff - appellant.

17.3 Ms.Patel has further relied upon the decision reported in AIR 1970 SC 1818 [Ram Prasad v/s the State of Madhya Pradesh and another]. In that case, the question before the Court was found to be a mixed question of law and fact and it was held that, in absence of specific plea, the question cannot be gone into. In the opinion of this Court, this judgement rather helps respondent side, as discussed above. The question regarding parties belonging to the schedule tribe is a mixed question of law and fact, and it having not been controverted right upto the stage of second appeal by the plaintiff, this Court is not inclined to interfere with the findings of the trial Court.

17.4 Ms. Patel has further relied upon the decision reported in AIR 1997 SC 1906 [Major Singh v/s Rattan Singh and others], wherein it was observed that the High Court would be justified in interfering with the findings given by the trial Court, if it is found that the evidence led by a party was rejected on flimsy grounds. In the instant case, as discussed above, this Court does not find anything to apply this principle to the facts of the present case.

17.5 Mr. Shah, learned advocate for the respondents has relied upon a decision reported in AIR 1989 SC 1809 [Corporation of the City of Bangalore v/s M. Papaiah and another], wherein it has been held that revenue record is not a document of title. Interpretation of revenue record is not a question of law and finding of fact rendered by the lower court on the basis of interpretation of revenue record, if interfered by the High Court in appeal u/s 100 of the CPC, is illegal. In the instant case, the lower court has considered the evidence in respect of the mutation of the properties to the name of the plaintiff and has come to the conclusion that the revenue record is not reliable. This finding cannot be interfered with by this Court in view of this judgement, as a result, the alternative relief can be said to have been rightly denied by the Courts below.

18. So far as the alternative contention and relief sought for by the plaintiff is concerned, it may be noted that the Courts below have not believed the case of the plaintiff in light of the evidence on record. The trial Court has specifically observed that the case of partition, entries having been made with the consent of the defendant, and recording of the statement of the defendant cannot be accepted. These are finding of fact based on appreciation of evidence. There is nothing to

indicate that these findings are perverse or that they are founded on gross misreading and misinterpretation of evidence. This Court is therefore not inclined to interfere with the findings while sitting in second appeal.

19. For the foregoing reasons, the appeal must fail. The substantial question of law framed by this Court is therefore answered in the negative.

20. The appeal is dismissed with no orders as to costs.

[A.L.DAVE, J.]

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